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**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>THOMAS FRANKLIN WHEELOCK,<br>Defendant and Appellant. | A096854<br><br>(Alameda County<br>Super. Ct. No. C132906) |

A jury convicted Thomas Franklin Wheelock of first degree murder with personal use of a firearm, and with the special circumstance that the murder was committed during a robbery. The jury rejected a special circumstance allegation that the murder was committed while Wheelock was lying in wait. After a penalty trial, the jury chose a sentence of life without the possibility of parole. The court imposed that sentence, and stayed a four-year term for the firearm use. Wheelock raises a series of claims on appeal. There was no reversible error, and therefore we affirm.

## BACKGROUND

On November 24, 1997, Armored Transport, Inc. informed the Oakland police that one of its armored trucks was missing. Wheelock and Rod Cortez were the employees who had been on duty in that truck. The next day, the truck was found behind an auto parts store in San Ramon. Cortez's body was in the truck; he had been shot three times in the right side of the head and neck.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 1, 2, 3, 5, 6, 7, and 8.

On November 27, a Utah highway patrol officer stopped Wheelock as he drove a Ford Bronco without a rear license plate, which was a violation of Utah law. Wheelock gave the officer his driver's license and a bill of sale for the Bronco. A computer check revealed a warrant for Wheelock's arrest. As he took him into custody, the officer asked Wheelock if he knew why he was being held at gunpoint. Wheelock replied "because I robbed my work." The officer asked if he had hurt anyone, and Wheelock said "yeah, I did." Wheelock nodded his head when asked if he had shot "him." The officer asked what happened, and Wheelock said "I just flipped out. I was going to lose my job soon and I just —." Wheelock stopped responding at that point.

That night, Wheelock was interviewed by Oakland police officers in a Utah jail. He was cooperative, and did not deny the shooting. Parts of the interview were taped, but no details of this interrogation were entered into evidence.

The next day, Wheelock gave another interview in the Utah jail to an Alameda County prosecutor. A tape of this interrogation was played for the jury. Wheelock waived his *Miranda* rights and gave the following account. He had returned from a Caribbean cruise with his friend Peter York the day before the shooting. Just before the cruise, Wheelock learned the state had denied his application for a card authorizing him to be a security guard. This meant he would not be able to continue working for Armored Transport. He started thinking about robbing an armored car and going to Canada to "try to start over." On the second or third day of the cruise, he began making notes on his plan. Shooting his partner in the armored car was always a part of the plan.

Wheelock's goal was to try to become an assassin after the robbery. He had considered doing the robbery on the Wednesday before Thanksgiving, but was concerned he might be sent home when he reported on Monday of that week because of the problem with the guard card. He had lunch with York before going to work on Monday, and told him he was "going to do it." Wheelock asked York to leave a backpack with a change of clothes and an extra gun by the side of York's house. York complied with this request.

Wheelock planned to commit the robbery as he and Cortez were on the way to Union Bank, but could not bring himself to do it then. Wheelock failed to correctly

account for some bags of checks at Union Bank, which threw them off schedule. Wheelock said Cortez was "a little upset with me." They were due at Brinks by 7:30, but showed up "very late." The Brinks employees were angry, and Wheelock apologized. Cortez "got real mad at me for apologizing because we're supposed to just blame it on something else and not on ourselves."

Wheelock said the fact he had "screwed up" that day made him worry that his job would be further jeopardized. When they loaded up the money at Brinks, he "just flipped." Cortez was driving the truck as they pulled away from Brinks at around 8:00. Cortez told Wheelock again that he shouldn't have apologized, and said Wheelock was going to have to "figure out the paperwork." Wheelock drew his gun and shot Cortez three times. He thought the second shot missed. The truck was "barely moving," and Wheelock managed to push Cortez away from the wheel and get himself into the driver's seat.

Wheelock drove the truck to San Ramon and parked it in an out-of-the way place behind the parts store. He was covered with blood when he got out, and washed himself at a faucet behind the store. He ran to York's house, three or four blocks away. He took the backpack York had left for him, as well as a duffel bag he found in York's garage, and returned to the truck. Wheelock loaded the money into the duffel bag, but found it too heavy to carry. He put some money in the backpack, left the duffel bag in some bushes, and returned to York's house. There he left some money for York, as he had promised to do.

Wheelock then walked to a restaurant and called a taxi. After an abortive attempt to take a train to Portland, he took another taxi to Walnut Creek, where he found York in a video arcade. York worked at the arcade but was off duty. He agreed to drive Wheelock to Sacramento. First they went back to San Ramon and picked up the duffel bag with the money. York then took Wheelock to a motel in Sacramento. The next morning, Wheelock bought the Bronco at a used car lot. When he returned to the motel, he saw a police car and decided not to get the money he had left in his room. He got on the freeway with the money he had with him, around $28,000.

Wheelock took Interstate 5 north through Redding, then turned east because he wanted to stay off major highways. After getting lost, and spending a sleepless night in Idaho, he decided he "didn't want to do it anymore." He had always wanted to see Colorado, so he was on his way there, intending ultimately to return to California, when he was arrested.

We will discuss further facts as they are relevant to Wheelock's contentions on appeal.

## DISCUSSION

1. *The Grand Jury Indictment*

Wheelock was initially charged with murder by a complaint that also alleged a number of special circumstances. On January 5, 1998, he filed a motion seeking a broad range of discovery. The court issued a tentative ruling on May 8 granting the motion as to most of the requested items, on the ground that Wheelock was entitled to discovery so he could effectively respond to the prosecution's attempt to establish probable cause at the upcoming preliminary hearing. At the hearing on the tentative, the prosecutor said he would "confer with some of our people in law and motion in superior court to see what our options would be." The court adopted the tentative ruling as its final order.

The prosecutor then said he had discovered some new evidence that would support a perjury charge, and asked the court to postpone the preliminary hearing, which was set for May 26, 1998. Defense counsel agreed with this proposal. The court vacated the preliminary hearing date and set June 2 as the time for compliance with the discovery order.

On May 28, 1998, the prosecutor obtained a grand jury indictment charging Wheelock with murder under special circumstances and perjury. The prosecutor then moved to dismiss the charges in Municipal Court. At the hearing on the motion, defense counsel objected that the indictment was procured solely to avoid compliance with the court's discovery order. The prosecutor denied this accusation. The court observed "obviously the timing of the indictment is curious," and wondered whether it still had

jurisdiction to require compliance with its discovery order. Defense counsel argued that while the prosecutor ordinarily would have discretion to seek a grand jury indictment, he could not do so in retaliation for Wheelock's assertion of his discovery rights. He also contended there was no reason why the prosecutor could not both comply with the discovery order and dismiss the complaint.

The court noted there was no evidence to support a finding that the district attorney's office had acted with an ulterior motive. However, the court was quite concerned about the prosecutor's failure to comply with its discovery order. The court concluded that without evidence of any improper motive, it would be improper to grant Wheelock's request for dismissal as a discovery sanction. Instead, the court granted the prosecution's request for a dismissal, and left it for counsel to pursue the issue of compliance with the discovery order in Superior Court.

Wheelock moved in Superior Court to dismiss the indictment on the ground of vindictive prosecution. He contended the indictment had been obtained to punish him for asserting his discovery rights and to avoid complying with the Municipal Court's discovery order. The prosecutor denied acting vindictively, and argued "the grand jury is a viable alternative . . . particularly . . . where defense [counsel] threatens to discover a case to death." The prosecutor contended discovery is properly conducted pre-trial, rather than before the preliminary hearing. He noted that discovery would not be significantly delayed, because proceeding by indictment would result in an earlier trial date than if a preliminary hearing were held. The court denied the motion to dismiss the indictment.

On appeal, Wheelock renews the claim that his due process rights were violated by the prosecutor's retaliatory response to Wheelock's exercise of his discovery rights. Wheelock acknowledges that no presumption of vindictiveness arises from charging decisions made during the pre-trial process. (*United States v. Goodwin* (1982) 457 U.S. 368, 381-382.) However, he contends he "prove[d] objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." (*Id*. at p. 384.) We disagree. The Municipal Court

judge expressly declined to make such a finding, despite her expressions of concern. We will not interfere with that determination by the judge most familiar with the circumstances.

Furthermore, Wheelock was not "punished" in any legally cognizable way by the prosecutor's actions. He was not entitled to a preliminary hearing. (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 187 [prosecutor has discretion to seek indictment while complaint is pending]; *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 49 [indicted defendant is not entitled to preliminary hearing].) Thus, he had no right to the early discovery he sought for purposes of the preliminary hearing, once the prospect of that hearing was removed by the filing of the indictment. It cannot be considered "punishment" for the prosecutor to decide to proceed by way of indictment in response to pre-trial defense motions. Any other rule would unduly restrict the prosecutor's charging discretion.

2. *The Failure to Preserve the Brinks Videotape*

Wheelock moved to dismiss the special circumstances allegations because the prosecution had failed to preserve a surveillance videotape taken by Brinks on the evening of the murder. Alternatively, he requested a jury instruction to the effect that the tape would have shown Cortez yelling at Wheelock and provoking him after Wheelock returned to the armored truck after the Brinks delivery. In a declaration attached to the moving papers, defense counsel quoted notes taken by Oakland Police Sergeant Mike Yoell: "A Brinks representative called McCoy [the Corporate Director of Security for Armored Transport, Inc.] and verified Wheelock and Cortez had made a money drop off and picked up approximately $300,000 in cash at 1930 last night (24Nov97) . . . . Brinks has the video tape from surveillance cameras which they will hold for OPD." After prolonged attempts by the defense to obtain the tape, however, the prosecutor informed counsel that it had been lost or destroyed.

Defense counsel declared he had spoken to Brinks personnel familiar with the surveillance video system, and learned that cameras were situated so as to record the

entry and exit of armored trucks. Counsel's own observations led him to conclude the cameras would "record activities on the street in the area in front of the entry gates, as well as in the driveway, parking lot and delivery bays." Counsel concluded: "on information and belief, the Brinks surveillance video tape most probably recorded Mr. Cortez yelling at defendant and the shooting itself."

At the first hearing on the motion, however, counsel advised the court of new information he had discovered since filing the motion. He said, "it turns out that the cameras on the outside of the building that are pointed right to where the shooting occurred — [¶] . . . they don't preserve that on videotape. They look at that live, but they don't actually keep that on videotape. . . . So at this point, I can only say in good faith that I do not believe the shooting was preserved on videotape."

Two witnesses testified at the hearings, Yoell (a lieutenant by the time of the hearing) and Sergeant Michael Foster of the Oakland Police. Yoell said he had learned from Brinks that there was a tape, and that they would "maintain it for me." Yoell was unclear about what was actually on the tape. He was told it "would show either the truck coming in to drop off money or the two people in the truck delivering the money or — delivering the money and maybe taking some money." Yoell testified the prosecutor had repeatedly asked him to track down the tape, but each time he contacted Brinks he was told "they had it, but they were looking for it, things like that." On one occasion, he went to Brinks personally but the employee responsible for the tape was not there. Eventually, the Brinks employee told Yoell the tape "did not exist," because it "had been destroyed." The police had never had the tape in their possession. Yoell was not even certain a tape had ever existed.

Foster testified that he never attempted to retrieve the tape. He had assumed there was nothing remarkable on it, because the case had received considerable publicity but no one from Brinks had told the police there was something they should look at.

The court denied the motion. It noted that in any event, the videotape would not have included any audio recording of conversations between Cortez and Wheelock. The

court found the exculpatory value of the tape was a matter of speculation, and therefore no bad faith could be attributed to the police in failing to secure the tape.

"Law enforcement agencies have a duty to preserve evidence 'that might be expected to play a significant role in the suspect's defense.' [Citations.] To fall within the scope of this duty, the evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' [Citations.] Furthermore, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' [Citations.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1042.) A mere possibility that evidence might have helped the defense is insufficient. (*People v. Fauber* (1992) 2 Cal.4th 792, 829.)

Here, substantial evidence supports the trial court's ruling that the Brinks videotape had only speculative exculpatory value, and thus Wheelock failed to establish any bad faith in the failure to preserve it. (*People v. Memro* (1995) 11 Cal.4th 786, 831 [substantial evidence standard applies to bad faith issue].)

Wheelock claims the police should have realized from his discovery requests and his confession that he would claim Cortez had provoked the shooting. He argues "the tape would likely have depicted Cortez's hostile demeanor," and also the movements of the truck after the shooting. This latter claim is untenable, in light of counsel's concession below that the shooting would not have been taped.[1] The possibility the tape might have shown some visual indication of a hostile interaction between Cortez and Wheelock during the delivery at Brinks was not enough to give the police or the prosecutor reason to believe the tape would "play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488; *People v. Zapien* (1993) 4

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**1** We note that while counsel stated he had visited Brinks and spoken with employees familiar with the security cameras, he called no Brinks witnesses to explain what might have been captured on videotape on the evening of the murder.

Cal.4th 929, 965.) The only indication of such an interaction in Wheelock's confession was his statement that Cortez "got real mad at me" for apologizing to the Brinks people about being late. Though it was conceivable Cortez may have engaged in a hostile display in front of Brinks security cameras, that possibility was hardly enough to "meet [the] standard of constitutional materiality." (*California v. Trombetta*, *supra*, 467 U.S. at p. 489.)

3. *The Composition of the Grand Jury*

A. *Background*

Wheelock moved to set aside the indictment, alleging discrimination in the composition of the grand jury. He noted that of the 19 members on the grand jury that indicted him, 6 were women, 2 appeared to be Hispanic, one was Asian, 7 were African-American, and 9 were Caucasian. The foreman was male, and "neither Asian-American nor Hispanic-American."

Defense counsel's investigator had examined photographs of the grand juries convened over the past 30 years in Alameda County. Based on his visual examination of the pictures, the investigator concluded that from 1968-1969 through 1998-1999, there had been 406 Caucasian grand jurors, 77 African-Americans, 27 Asians, and 36 Hispanics, with 43 grand jurors not pictured. The rosters for these years identified 21 of the 31 foremen, none of whom had a surname that appeared to be Hispanic or Asian, and 6 of whom appeared to have been female. From 1968-1969 through 1999-2000, the investigator found there were 345 male and 263 female grand jurors, based on the names appearing on the rosters.

Wheelock referred to census figures showing that in 1970, the population of Alameda County was 15% African-American and 12.6% Hispanic, with no figure given for Asians. In 1980, the population of the county was 67% Caucasian, 18.42% African-American, 7.77% Asian or Pacific Islander, 11.76% Hispanic, and 6.8% other.[2] In 1990,

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[2] Wheelock explained that the excess above 100% was attributable to Hispanics being classified as "Spanish origin" without regard to race. For instance, the 1980 census listed 2,662

the numbers were 59.6% Caucasian, 17.92% African-American, 15.109% Asian or Pacific Islander, 13.09% Hispanic, and 6.69% other. In 2000, the numbers were 48.8% Caucasian, 14.9% African-American, 20.9% Asian, 19.0% Hispanic, and 10.1% other, including Pacific Islander.

Wheelock claimed standing to challenge the exclusion of groups to which he does not belong, under *Powers v. Ohio* (1991) 499 U.S. 400, and *Holland v. Illinois* (1990) 493 U.S. 474. He contended the failure of the grand jury to represent a fair cross-section of the community was a violation of the equal protection clause under *Castaneda v. Partida* (1977) 430 U.S. 482, and discrimination in the selection of a foreman violated equal protection under *Rose v. Mitchell* (1979) 443 U.S. 545. He also argued due process violations in the selection of the foreman under *Hobby v. United States* (1984) 468 U.S. 339, and of the grand jury itself under *Duren v. Missouri* (1979) 439 U.S. 357.

At the hearing on the motion, it was stipulated that Wheelock's mother would testify she was half Hispanic, making Wheelock a quarter Hispanic. Wheelock called four witnesses. Judge Philip Sarkisian was Alameda County Superior Court Presiding Judge in 1998 and 1999. He testified that each year, every judge would be asked to nominate a candidate for the grand jury. A certain number of names would be obtained from each judicial district. Not every judge would submit a nomination, and some would submit more than one. Citizens would sometimes volunteer to serve, and their names would be given to the presiding judge, who would speak to the volunteer or have another judge speak to them to determine if they were an acceptable candidate. The names of the nominees would be placed in a hopper, and a randomly selected to make up the grand jury. The presiding judge would choose a foreperson from a short list of candidates, selected from the grand jurors by a district attorney who acted as legal advisor to the grand jury.

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of the 129,962 Hispanics in Alameda County as black (2%). The 1990 census showed 4,859 of the 176,017 Alameda County Hispanics as black (2.8%), and 6,784 as Asian or Pacific Islander (3.9%). The 2000 census figures submitted by Wheelock did not include this breakdown of the Hispanic population.

Zakiya Hooker-Bell was the Alameda County Superior Court manager for jury services. She had served in that capacity since about 1990. During that time the 19 members of the grand jury were selected from nominees provided by judges and volunteers. The presiding judge or Hooker-Bell would interview the volunteers and decide whether to nominate them. In a typical year there would be 25-50 volunteers. Some volunteers would withdraw after learning the extent of the duties involved. Hooker-Bell did not keep records of the gender or ethnicity of grand jurors, and had refused to supply defense counsel with the addresses of grand jurors over the last 30 years, without a court order authorizing disclosure. The court informed defense counsel that if he wanted such an order, it would have to come from the presiding judge.

Judge Ronald Sabraw had been an Alameda County Superior Court judge for 12 years, and was presiding judge in 1996-1997 when the grand jury that indicted Wheelock was impaneled. He confirmed the selection process described by Judge Sarkisian and Ms. Hooker-Bell. Judge Sabraw said he routinely nominated the volunteers, once he determined they were eligible, interested, and informed about the responsibilities. He did not recall any discussion about changing the grand jury selection procedures in the past 12 years. He selected the foreman from the short list provided by the district attorney, based on their "people skills" and administrative ability. Neil Goodhue, the foreman of Wheelock's grand jury, was a Caucasian male. Judge Sabraw had encouraged other judges to be mindful of geographic, racial, and economic diversity when making their grand jury nominations, but there was no specific program or policy to that end.

The investigator for the defense, Robert Caturegli, testified regarding his research into the composition of the grand juries. The photographs he examined were black and white group pictures. If he was unsure of a juror's race from the photograph, he would look at their surname. He would have categorized Wheelock as Caucasian. He had completed his racial categorization by the time he was asked to investigate gender, and based his gender determinations on the names of the jurors.

Wheelock argued that Asians and Hispanics were underrepresented on Alameda County grand juries. (In his moving papers, though not at the hearing, Wheelock also

contended women had been discriminated against.) The court ruled that Wheelock had failed to make a prima facie case of discrimination on both his due process and equal protection theories. The equal protection test required Wheelock to show that the grand juror selection process was susceptible to abuse or not racially neutral, and the court found no evidence that Alameda County's process was not racially neutral. The due process test required a showing of systematic exclusion, and the court determined that no evidence supported such a finding. The court made no finding on the gender discrimination claims, and Wheelock did not ask for a finding.

B. *The Merits of the Discrimination Claims*

Wheelock renews his constitutional arguments on appeal. Claims of discrimination in grand jury selection under the equal protection and due process clauses are governed by similar tests devised by the United States Supreme Court.

To establish a prima facie case under the equal protection clause, Wheelock had to show (1) an excluded group was a recognizable, distinct class; (2) there was substantial underrepresentation over a significant period of time based on comparison of the proportion of the excluded group in the population to the proportion serving as grand jurors; and (3) the selection procedure was susceptible to abuse or not racially neutral. (*Castaneda v. Partida*, *supra*, 430 U.S. 482, 494.) The same test applies to an equal protection challenge to the selection of a foreman. (*Rose v. Mitchell*, *supra*, 443 U.S. 545, 565.)

To establish a prima facie case under the due process clause, Wheelock had to show (1) an excluded group was a "distinctive" group in the community; (2) the representation of this group on the list from which juries were selected was not fair and reasonable in relation to the group's numbers in the community; and (3) the underrepresentation was due to systematic exclusion of the group in the selection process. (*Duren v. Missouri*, *supra*, 439 U.S. 357, 364.) The selection of a foreman from a panel infected with discrimination may violate due process, if the foreman's role is more than merely ministerial. (See *Hobby v. United States*, *supra*, 468 U.S. 339, 345-346.)

Initially, we note that Wheelock abandoned his claim of gender discrimination by failing to argue it at the hearing below, or to ask the court to make a finding on the point. (*People v. Brewer* (2000) 81 Cal.App.4th 442, 459-460.) In any event, Wheelock's evidence of the gender composition of Alameda County grand juries was very thin. He based his showing solely on the names of the jurors, without consulting the available photographs. He provided only a single breakdown of male and female grand jurors over a 31-year period, without analyzing the gender composition of each panel or tracking gender representation over the years. This was a patently insufficient showing of unconstitutional gender discrimination.

Regarding the race discrimination claims, we agree with Wheelock that the court erred by relying on the neutrality of the selection process to find that Wheelock had failed to make a prima facie equal protection case. Under *Castaneda v. Partida*, *supra*, 430 U.S. at p. 494, Wheelock only needed to show a process that was "susceptible to abuse." Clearly, he met this lenient standard. However, our review of the record convinces us that Wheelock failed to make a prima facie showing of substantial underrepresentation. Thus, both his equal protection and due process challenges must fail.[3]

Wheelock's factual showing was particularly deficient regarding the selection of grand jury foremen over the years. He relied on the grand jury rosters to identify the foremen and their race. However, those rosters did not specify the foremen of the five grand juries preceding the one that indicted Wheelock. The testimony of Judge Sabraw identified the foreman of the 1996-1997 grand jury as Neil Goodhue, who was also foreman of the 1997-1998 grand jury that considered Wheelock's case. Nevertheless, without any indication of the race of the foremen in the years 1992-1993 through 1995-1996, it is impossible to determine whether Goodhue's selection in the next two years was the product of persisting racial discrimination.

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**3** Wheelock's due process claim is also defective because he has made no attempt to show actual prejudice, as he must do to obtain a reversal on due process grounds. (*People v. Brown* (1999) 75 Cal.App.4th 916, 931.)

Wheelock's data on the composition of the grand jury as a whole were more complete, but still included noteworthy defects. We consider only the data for grand juries from 1980-1981 through 1998-1999. The earlier data were not only remote in time, but also were not linked to the selection process described in the testimony. Indeed, Wheelock presented no evidence of the process used before 1989. Nevertheless, we will examine the data for the 1980's to determine whether there was a pattern of unconstitutional underrepresentation.

There are some obvious anomalies in the numbers. The roster for each year shows 19 grand jurors, yet Wheelock's racial breakdowns reflected a total of 20 grand jurors in 1983-1984, 1989-1990, 1991-1992, 1997-1998, and 1998-1999. The breakdowns totaled only 18 grand jurors in 1984-1985, 1990-1991, 1992-1993, 1994-1995, and 1996-1997. Only 17 jurors were reflected in the 1986-1987 and 1995-1996 breakdowns, and only 15 in 1980-1981. Thus, of the 19 years under consideration, Wheelock's categorization of the grand jurors' race accurately reflected the total number of jurors in only 6 years. The proportional comparisons that may be drawn from these figures are necessarily skewed. We note also that in 1982-1983, Wheelock claimed there were no Asian grand jurors and 3 Hispanics, but the roster for that year includes 3 Asian names and no Hispanic names. In 1992-1993, Wheelock claimed there were no Asian grand jurors, but the roster shows one Asian name. We have corrected the latter two errors for purposes of our analysis.

In weighing the grand juror numbers against the census data relied on by Wheelock we also keep in mind that gross population statistics do not accurately reflect the number of those eligible for grand jury service. (*People v. Alexander* (1985) 163 Cal.App.3d 1189, 1202; accord, *People v. Morales* (1989) 48 Cal.3d 527, 548. See also Pen. Code, § 893 [grand jurors must be 18 or older, of sound judgment and fair character, conversant in English, and without a felony conviction].) Our Supreme Court has held that total population figures may be used by a defendant to establish significant disparities in juror pools, but only if more refined statistics reflecting the proportion of those eligible for jury service are not available. (*People v. Bell* (1989) 49 Cal.3d 502, 526, fn. 12.) Here, Wheelock attached to his motion at least one "more refined"

breakdown showing the adult populations of the racial groups in Alameda County, prepared in August 1991 for purposes of supervisorial redistricting. He did not rely on this data in his arguments, however, nor did he show that such data were unavailable for other relevant time periods.

Finally, before turning to the numbers we note that Wheelock offered no expert statistical or demographic testimony, as is common in similar litigation. (See, e.g., *People v. Ramos* (1997) 15 Cal.4th 1133, 1152; *People v. Ochoa* (2001) 26 Cal.4th 398, 426, disapproved on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

Wheelock's data showed the grand jury that indicted him included 10 Caucasians, 7 African-Americans, 1 Asian, and 2 Hispanics. Assuming the "extra" juror in these numbers was Caucasian, this grand jury was 47.4% Caucasian, 36.8% African-American, 5.3% Asian, and 10.5% Hispanic. According to Wheelock's numbers (with the corrections noted above), on the grand juries from 1990-1991 through 1998-1999, there were 92 Caucasians (63%), 33 African-Americans (22.6%), 9 Asians (6.2%), and 12 Hispanics (8.2%). From 1980-1981 through 1998-1999 there were 250 Caucasians (70.1%), 58 African-Americans (16.4%), 22 Asians (6.2%), and 24 Hispanics (6.8%).

The 2000 census numbers reflected a county population that was 48.8% Caucasian, 14.9% African-American, 20.4% Asian, and 19% Hispanic. An average of the 1990 and 2000 census numbers provides proportions of 54.2% Caucasian, 16.4% African-American, 17.0% Asian, and 16.4% Hispanic. The average of the 1980 and 1990 census figures was 63.3% Caucasian, 18.2% African-American, 11.4% Asian, and 12.8% Hispanic. An average of the 1980, 1990, and 2000 census numbers yields proportions of 58.5% Caucasian, 17.1% African-American, 14.4% Asian, and 14.9% Hispanic.

Thus, the following "absolute disparities" can be drawn from the data (see, e.g., *People v. Morales*, *supra*, 48 Cal.3d at pp. 543-544):[4] The percentage of Hispanics on

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[4] Wheelock discussed various methods of statistical comparison in his motion papers below, but applied none of them to the data he submitted. At the hearing in the trial court, he accepted the absolute disparity standard for purposes of his motion. (Though counsel misspoke

Wheelock's 1997-1998 grand jury was 8.5% less than the percentage in the 2000 census, and 5.9% less than the average of the 1990 and 2000 census figures. The percentage of Asians on this grand jury was 15.1% less than the percentage in the 2000 census, and 11.7% less than the average of the 1990 and 2000 census figures. Looking at the composition of the grand juries over time, the percentage of Hispanic grand jurors in the 1990's was 8.2% less than the average of the 1990 and 2000 census figures; in the 1980's, the Hispanic percentage was 6% less than the average of the 1980 and 1990 census figures. Comparing the Hispanic grand juror percentage over both decades with the average of the 1980, 1990, and 2000 censuses, the absolute disparity for Hispanics was 8.1%. The corresponding disparities for Asians were 10.8% in the 1990's, 5.2% in the 1980's, and 8.2% over both decades.

Neither our Supreme Court nor the United States Supreme Court has decided what degree of disparity is unconstitutional. (*People v. Ochoa*, *supra*, 26 Cal.4th 398, 427.) We conclude Wheelock's statistical presentation was insufficient to make out a prima facie case of underrepresentation. In a county like Alameda, with substantial populations of four major racial groups, it is unrealistic to expect grand juries of only 19 members to consistently mirror demographic trends in the county. (See *People v. Bell*, *supra*, 49 Cal.3d at p. 530 [Sixth Amendment does not require race-conscious creation of jury venires].) Most of the absolute disparities noted in the paragraph above are less than 10%. While it appears that in the 1990's, and on Wheelock's grand jury in particular, the selection process did not keep up with a rapid increase in the Asian population, this evident failing constitutes neither a "substantial underrepresentation over a significant period of time" (*Castaneda v. Partida*, *supra*, 430 U.S. at p. 494) nor an unfair and unreasonable representation of Asians on grand juries (*Duren v. Missouri*, *supra*, 439 U.S. at p. 364).

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and referred to "comparative disparity," the context conclusively shows he was adopting the absolute disparity standard.)

In any event, the force of Wheelock's presentation on this issue was considerably diminished by the sloppiness of his grand jury data compilation, his failure to explain the necessity of using gross population figures from the census, and the absence of any expert testimony to elucidate the inferences that may be drawn from the data.

4. *The Motion to Suppress the Utah Statement*

Wheelock moved to suppress the statement he made at the Utah jail where he was held pending extradition to California. His principal argument was that, because he was represented by Utah counsel for purposes of the extradition proceedings, the prosecutor's questioning in the absence of Wheelock's attorney violated his Sixth Amendment right to counsel under *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*). The court denied the motion, ruling that since Wheelock had not yet been charged, his Sixth Amendment right to counsel had not attached and thus there was no *Massiah* violation.

On appeal, Wheelock acknowledges that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." (*United States v. Gouveia* (1984) 467 U.S. 180, 187; see also *Texas v. Cobb* (2001) 532 U.S. 162, 172 ["the Sixth Amendment right to counsel attaches only to charged offenses"]; *Fellers v. United States* (2004) __ U.S. __, 124 S.Ct. 1019, 1022.) However, Wheelock notes that state law determines when a prosecution commences for purposes of the Sixth Amendment right to counsel. (*Moore v. Illinois* (1977) 434 U.S. 220, 228.) He claims that under Penal Code section 804, subdivision (d), his right to counsel attached upon the issuance of an arrest warrant.[5] He also contends the right to counsel attaches at the commencement of extradition proceedings under California law. Neither of these arguments is sound.

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**5** Penal Code, section 804, subdivision (d) states: "For the purpose of this chapter, prosecution for an offense is commenced when any of the following occurs: [¶] . . . [¶] (d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint."

By its terms, Penal Code section 804 governs commencement of prosecution "for purposes of this chapter [Chapter 2, Title 3, Part 2 of the Penal Code]." It was drafted with the statutes of limitation in mind. (See Cal. Law Rev. Com. com., 50 West's Ann. Pen. Code, § 804 (2004 supp.) pp. 56-57; *People v. Le* (2000) 82 Cal.App.4th 1352, 1357-1358.) To determine when Sixth Amendment rights attach, the California Supreme Court follows the holdings of the United States Supreme Court. (E.g., *People v. Martinez* (2000) 22 Cal.4th 750, 758-765 [right to speedy trial]; *People v. Slayton* (2001) 26 Cal.4th 1076, 1081-1083 [right to counsel]; *People v. Clair* (1992) 2 Cal.4th 629, 657 [right to counsel.) In *United States v. Gouveia*, *supra*, 467 U.S. 180, the high court made it clear that the Sixth Amendment right to counsel does not attach at the time of arrest: "Our speedy trial cases hold that that Sixth Amendment right may attach before an indictment and as early as the time of 'arrest and holding to answer a criminal charge,' [citations], but we have never held that the right to counsel attaches at the time of arrest. This difference is readily explainable, given the fact that the speedy trial right and the right to counsel protect different interests. While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest . . . ." (*Id*. at p. 190.)[6]

As further explained in *Moran v. Burbine* (1986) 475 U.S. 412, 430: "The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any 'criminal prosecutio[n],' U.S. Const., Amdt. 6, the accused shall not be left to his own devices in

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**6** Wheelock suggests *People v. Webb* (1993) 6 Cal.4th 494, 527 supports the view that the Sixth Amendment right to counsel may attach at the time of arrest. Not so. Webb was already in custody on unrelated charges when information was elicited from him. The court's statement that his Sixth Amendment rights had not attached because "he was not arrested on capital charges until the day after" his statements were taped was directed toward the charges, not the "arrest." This is clear from the *Webb* court's citation of *Gouveia*, *supra*, and its reliance on the rule that the Sixth Amendment right to counsel "attaches only to those offenses for which adversary judicial proceedings have begun." (*Id*. at p. 527 and 528, quoting *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175.)

facing the ' " 'prosecutorial forces of organized society.' " ' [Citations]. By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the 'intricacies . . . of law,' *ibid.*, is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.' [Citation.]"

Here, the prosecution was still in the investigatory stage when Wheelock was questioned. "For an interrogation, no more or less than for any other 'critical' pretrial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel. As *Gouveia* made clear, until such time as the ' " 'government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified' " ' the Sixth Amendment right to counsel does not attach. [Citations.]" (*Moran v. Burbine*, *supra*, 475 U.S at p. 432.) Thus, a defendant's right to the presence of an attorney during interrogation arises only "after the first formal charging proceeding." (*Id*. at p. 428.)

To support his alternate claim that the right to counsel under the Sixth Amendment arose with the commencement of extradition proceedings, Wheelock cites *People v. Boyd* (1978) 86 Cal.App.3d 54 (disapproved on another point in *People v. Clair*, *supra*, 2 Cal.4th at p. 722), and *People v. Booker* (1977) 69 Cal.App.3d 654. These cases do not help him.

Booker was questioned by California police officers in a New Mexico jail, where he was under arrest for a robbery in New Mexico. (*People v. Booker*, *supra*, 69 Cal.App.3d at p. 660.) After stating the rule that *Massiah* applies only after "adversary proceedings have commenced," the court observed: "[I]n this case, however, no adversary proceedings had commenced against defendant concerning the crime about which he was being interrogated. No arrest warrant had issued on the murder charges and no extradition proceedings were underway." (*People v. Booker*, *supra*, 69 Cal.App.3d at p. 663.) However, the court's reference to an arrest warrant and extradition proceedings was merely descriptive of the early stage of the investigation. The holding of *Booker* conforms to the usual rule: "No charges had been filed against

appellant regarding [the California crimes], nor had counsel been appoint to defend him regarding them. Accordingly although counsel had been appointed on the New Mexico charges, the interrogations investigating the California crimes were permissible." (*Id*. at p. 664.) The *Boyd* case merely recites the context of the *Booker* holding. (*People v. Boyd*, *supra*, 86 Cal.App.3d at pp. 60-61.)

There is no case law from the United States Supreme Court or any California state court on whether extradition proceedings might be considered "adversary judicial proceedings" at which the Sixth Amendment right to counsel attaches. The question has been settled in the Federal Circuit Courts of Appeal, however. (E.g., *United States v. Yousef* (2nd Cir. 2003) 327 F.3d 56, 142, fn. 66 [extradition proceedings are not criminal proceedings, but civil proceedings related to criminal proceedings in another jurisdiction, and thus do not trigger any Sixth Amendment protections]; *DeSilva v. DiLeonardi* (7th Cir. 1999) 181 F.3d 865, 868-869 ["the Sixth Amendment does not apply to extradition"]; *Chewning v. Rogerson* (8th Cir. 1994) 29 F.3d 418, 420 ["It is well settled that extradition proceedings are not considered criminal proceedings that carry the Sixth Amendment guarantee of assistance of counsel"]; *Judd v. Vose* (1st Cir. 1987) 813 F.2d 494, 497 [extradition hearing has modest function not involving guilt or innocence, and is not criminal proceeding within meaning of Sixth Amendment].)

Wheelock relies on *Roper v. State* (Ga.1989) 375 S.E.2d 600, in which the Georgia Supreme Court held that interrogation of a suspect who had requested appointed counsel, and was represented by counsel at an extradition hearing, violated "the rule of *Edwards v. Arizona* 451 U.S. 477 [] (1981) and *Michigan v. Jackson* 475 U.S. 625 [] (1986)." (*Roper v. State*, *supra*, 375 S.E.2d at p. 601.) However, we believe the *Roper* court misconstrued the holdings of *Edwards* and *Jackson*. *Edwards* was not a Sixth Amendment case. (*Edwards v. Arizona*, *supra*, 451 U.S. at p. 480, fn. 7.) It involved the propriety of interrogating a suspect after he has invoked his right to counsel during questioning, under *Miranda* and the Fifth and Fourteenth Amendments. (*Id*. at p. 482.) Neither Roper nor Wheelock asserted their right to counsel during questioning. (*Roper v. State*, *supra*, 375 S.E.2d at p. 602.) *Jackson* involved the right to counsel during

postarraignment custodial interrogation. (*Michigan v. Jackson*, *supra*, 475 U.S. at p. 629.) The court noted that the arraignment "signal[led] 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." (*Ibid*.) Neither Roper nor Wheelock was charged or arraigned before the interrogations in question. (*Roper v. State*, *supra*, 375 S.E.2d at pp. 601-602.)

We note also that the *Roper* court assumed custodial interrogation was a "critical stage" of the proceedings for purposes of determining the right to counsel. (*Roper v. State*, *supra*, 375 S.E.2d at p. 603.) The United States Supreme Court has made it clear that such an assumption is unwarranted in the Sixth Amendment context. (*Moran v. Burbine*, *supra*, 475 U.S at p. 432 [interrogation alone is insufficient to trigger Sixth Amendment right to counsel; government must have committed itself to prosecute].) We find *Roper* unpersuasive.[7]

We agree with the approach taken by the Federal Courts of Appeal. The commencement of extradition proceedings is not enough, by itself, for the Sixth Amendment right to counsel to attach. Any other rule would be inconsistent with the United States Supreme Court's recognition that, before the formal instigation of charges, the investigative functions of the police should not be "unnecessarily frustrate[d]" by overprotective application of the Sixth Amendment. (*Maine v. Moulton* (1985) 474 U.S. 159, 179-180 [investigative powers are limited by Sixth Amendment only as to pending charges], accord, *Texas v. Cobb*, *supra*, 532 U.S. at pp. 170-171; see also, e.g., *McNeil v. Wisconsin*, *supra*, 501 U.S. at p. 181 [admissions of guilt after valid *Miranda* waivers

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**7** Wheelock also relies on *United States v. Harrison* (9th Cir. 2000) 213 F.3d 1206, for the proposition that the existence of an "ongoing relationship with counsel concerning the offense about which the defendant was interrogated" establishes a Sixth Amendment right to counsel. *Harrison* cannot be read so broadly. The court framed its holding thus: "[I]n limited and well-defined circumstances, a defendant's ongoing representation by an attorney, although that representation began before indictment, invokes the right to counsel once that right attaches at the time of indictment." (*Id*. at p. 1207.) Wheelock is in no position to take advantage of this rule. He was not under indictment, and it is difficult to characterize his relationship with Utah counsel as "ongoing" for purposes of a "pending criminal investigation," in the absence of any indication the relationship was expected to continue beyond the extradition proceedings. (*Id*. at p. 1213.)

serve compelling interest in solving and punishing crime], accord, *Texas v. Cobb*, *supra*, 532 U.S. at p. 172.)[8] The trial court properly denied Wheelock's motion to suppress the statements he made in the Utah jail.

5. *Admission of Wheelock's Burglary Conviction*

Wheelock's father testified on his behalf. Mr. Wheelock explained at length that his son suffered from a learning disability. Defense counsel also explored, in less detail, Wheelock's work history. Mr. Wheelock said his son's longest job was at a bakery where Mr. Wheelock was plant manager. Wheelock lasted for a little over a year there, but left because of the pressure put on him by other employees due to his father's position. Most of Wheelock's other jobs lasted only a couple of months.

Mr. Wheelock said his son had at least 30 jobs over the two or three years before his arrest in this case. Some lasted only a few days. Counsel inquired in particular about a restaurant job, which Wheelock lost because he was unable to remember the items on the menu. He was heartbroken about losing the position, but within an hour had changed clothes and gone out to look for another job. This was a typical response from Wheelock after losing a job.

On cross-examination, the prosecutor asked Mr. Wheelock about the bakery and restaurant jobs, and about other positions Wheelock had held. Mr. Wheelock remembered his son working for a security company, though he did not recall that it was Pinkerton. He did not know why Wheelock had lost that job. When the prosecutor asked if it wasn't true he lost the job because he was "burglarizing the businesses there," defense counsel objected "misstates. No good faith basis," and "calling for a legal conclusion as opposed to the fact." The court overruled the objection. Mr. Wheelock said his son never told him about the burglaries. The prosecutor introduced a plea

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**8** We emphasize, as did the *Cobb* court, that restricting the right to counsel under the Sixth Amendment before the filing of charges does not diminish a suspect's "rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation." (*Texas v. Cobb*, *supra*, 532 U.S. at p. 171.) Wheelock does not contest the validity of his *Miranda* waiver.

agreement in which Wheelock had pleaded no contest to a misdemeanor burglary. The court overruled defense counsel's objection, stating "this whole area was opened up" when counsel "[went] into his jobs, how many jobs did he have, he lost his jobs."

On appeal, Wheelock contends the burglary conviction was unduly prejudicial and irrelevant.[9] We disagree. On direct examination, defense counsel elicited testimony portraying Wheelock as a persistent but hapless job-seeker who lost positions for reasons beyond his control. Since the evidence showed that Wheelock began plotting his Armored Transport robbery after learning he would lose his job there, this was a significant point. We cannot say the court abused its discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [deferential abuse of discretion standard applies to rulings under Evid. Code, § 352].)

6. *Admission of the School Essay*

Mr. Wheelock also testified that his son had never committed an act of violence against another person before he shot Cortez. Wheelock himself testified that he had never been violent before. The prosecutor introduced a two-page essay Wheeler had written for a class he took to prepare for his G.E.D. It was dated February 1994, and entitled "The Fight." Wheelock said he had "made it up" for purposes of the class assignment. Defense counsel objected on hearsay and relevancy grounds. The court overruled the objection, and allowed the prosecutor to ask Wheelock to read the essay aloud. It described a school-yard incident in the fourth grade, in which Wheelock was challenged by a larger fifth-grade girl, Emilie, to a tetherball match. After the ball hit Emilie in the face, she approached Wheelock with her fists up and threw a punch that missed Wheelock but hit "a little third grader" named Dan. Wheelock wrote: "As Dan went flying through the air, I gave Emilie an upper cut that sent her flying through the air

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**9** Wheelock also suggests the cross-examination was improper because his job history was not a proper subject of direct examination. However, he fails to explain how the direct examination was improper.

also." He concluded: "That day I will always remember because from that day on I was never afraid to do anything again."

Wheelock claims the court improperly admitted this evidence because it was prejudicial and irrelevant. We must say the probative value of the document was highly tenuous, but its prejudicial effect was likewise negligible. Given the trial court's broad discretion in weighing the probative and prejudicial impacts of particular evidence, we cannot say the court erred in this instance. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

7. *The Prosecutor's Closing Argument*

Wheelock contends the prosecutor committed misconduct during closing argument by suggesting defense counsel had prepared his client to commit perjury in his testimony, coaching him to give a different story on the witness stand than he had told in Utah. Wheelock claims the court erroneously denied defense counsel's request for an admonition from the court regarding these comments. However, counsel's request for admonition, the day after closing arguments, was not directed at the comments to which Wheelock objects on appeal.

Counsel complained first about the prosecutor's argument that defense counsel had tried to hide Wheelock's burglary conviction from the jury in his opening statement. Counsel noted the court had earlier excluded the conviction from evidence. Secondly, counsel claimed it was improper for the prosecutor to attack him for asking questions the court had ruled inappropriate.

Wheelock's failure to object to the prosecutor's comments about preparing false testimony bars him from raising the issue on appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) Even if an objection had been made, and assuming the comments were improper, they were not the sort of pervasive and egregious prosecutorial misconduct that would warrant reversal. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1167.)

8. *Removal of a Juror During Deliberations*

After the jury had been deliberating for three days, the prosecutor moved to dismiss one of the jurors. He reminded the court that this juror, Ms. F., had disclosed during jury selection that she was being prosecuted for section 8 fraud. The prosecutor explained he had assumed that would be a federal prosecution, but during deliberations he had run a rap sheet on Ms. F. and discovered she was being prosecuted by his office and defended by the public defender, as was Wheelock. Defense counsel noted there was no indication of juror misconduct, and the court agreed, remembering that Ms. F. had been forthright about the pending case against her. Counsel contended the prosecutor had waived his right to challenge Ms. F. for cause, and noted Ms. F. was an African-American female and one of only two minorities on the panel.

The court rejected the notion that a racial issue was involved. It decided that "whether or not the juror can be fair or unfair is really not the issue. . . . the issue is whether or not the district attorney knew or should have known . . . ." The court found the prosecutor had been unaware of the fact that Ms. F. was represented by the public defender. The court granted the motion, acknowledging that it was "risky business."

Ms. F. was summoned, and the court explained to her that she would be excused from further service, not because she committed any misconduct but because the prosecutor had discovered her representation by the public defender. The court said, "I'm not disputing for one second that you could not be a fair and impartial juror in this case. I don't want you to feel that's the reason, but there's an issue of implied bias that you have." The court thanked Ms. F. for her service, and an alternate juror was seated.

Wheelock contends the dismissal of Ms. F. violated his right to a jury "constituted without regard to racial discrimination." However, he points to no evidence showing the prosecutor's motion was motivated by racial discrimination, other than that Ms. F. was one of only two African-American jurors. The record does not show, as Wheelock claims, that Ms. F. was the only juror on whom the prosecutor ran a rap sheet. This record does not establish that Wheelock's claim of racial discrimination was anything more than an allegation. We defer to the trial court's ruling on this point.

Wheelock raises a more substantial issue in a supplemental brief, contending a seated juror may not be removed for bias unless an examination of the juror demonstrates her inability to be impartial. Wheelock is correct; it is well settled that a seated juror may not be discharged unless "the record discloses reasonable grounds for inferring bias as a 'demonstrable reality' . . . . [Citations]." (*People v. Price* (1991) 1 Cal.4th 324, 400; see also 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 508, p. 722; *People v. Burgener* (1986) 41 Cal.3d 505, 520, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 756 [failure to conduct hearing to determine whether there is good cause to discharge juror is abuse of discretion]; *People v. Farnam* (2002) 28 Cal.4th 107, 141 [same].) Thus, the trial court erroneously dismissed Ms. F. on a finding of implied bias. The record must support an inference of "actual bias" to justify the removal of a sitting juror. (*People v. Keenan* (1988) 46 Cal.3d 478, 532.)

The error requires reversal only if it is reasonably probable that a result more favorable to the defendant would have been reached had the juror not been improperly discharged. (*People v. Bowers* (2001) 87 Cal.App.4th 722, 735; cf. *People v. Burgener*, *supra*, 41 Cal.3d at pp. 519-520.)[10] Wheelock can make no such showing. Nothing in the record indicates Ms. F. was favoring the defense during the deliberations before her discharge. The prosecutor's belief that she might be biased because of her representation by the public defender in a case prosecuted by his own office (the Alameda County District Attorney) went no further than mere suspicion, as far as we can tell.

Wheelock notes the jury reached a verdict only four and a half hours after the alternate juror was seated. He claims this suggests the jury improperly failed to begin

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**10** Wheelock suggests the error might also have federal constitutional dimensions. The cases he cites do not apply to the situation with juror F., however. There is no "evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case," as in *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1088. Wheelock was not denied the right to a jury trial, as in *Duncan v. Louisiana* (1968) 391 U.S. 145, 149. In any event, given the lack of any reliable indication Ms. F. was inclined to favor acquittal, and the strength of the prosecution's case, we would find the error harmless under any standard.

deliberations anew after Ms. F.'s discharge. We disagree. The court correctly instructed the jury to disregard its prior deliberations and start over with the alternate. We presume the jury followed this instruction. (*People v. Osband* (1996) 13 Cal.4th 622, 714.) The relatively brief period of deliberation with the alternate is not enough to demonstrate any impropriety in the jury's deliberations, given the overwhelming evidence of Wheelock's guilt.

When the trial court replaces a juror at the behest of the prosecutor, on the third day of deliberations, despite a specific finding that there is no reason to think she "could not be a fair and impartial juror," the error is particularly troubling. Not only has a juror who honestly disclosed her situation to counsel and the court and devoted a considerable amount of her time to jury service been improperly discharged, but the jury system itself seems to have been manipulated. We are compelled to affirm this verdict, however, given our constitutional duty not to set aside a judgment unless "an examination of the entire cause, including the evidence" leads us to conclude "the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

The evidence in this case was conclusive. It includes Wheelock's admission that he committed the robbery and shooting; that he planned the crimes well in advance during the Caribbean cruise; that on the day of the crimes he told Peter York he was going to carry out his plan that day, and asked him to leave a backpack with clothes and a gun by the side of York's house; and that he returned for the backpack after committing the crimes and left York a share of the money, as he had promised to do. Wheelock's provocation defense was seriously undermined not only by the evidence of advance planning, but also by the statements in his confession and at the time of his arrest that he "flipped" and shot Cortez on the day in question not because of Cortez's harassment, but because he feared he would lose his job with Armored Transport (and with it, inferentially, the opportunity to commit the robbery). Given these admissions, it is impossible to conceive of an acquittal, and difficult to imagine any jury returning a verdict of manslaughter rather than murder. Therefore, we will not reverse the judgment.

## DISPOSITION

The judgment is affirmed.

_____
Parrilli, J.

We concur:

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McGuiness, P. J.

_____
Corrigan, J.

*People v. Thomas Franklin Wheelock*, A096854

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|---|---|
| Trial Court: | Superior Court, Alameda County |
| Trial Judge: | Hon. Alfred DeLucchi |
| Counsel for Appellant: | Randy Baker, First District Appellate Project Independent Case System |
| Counsel for Respondent: | Bill Lockyer, Attorney General of the State of California; Robert R. Anderson, Chief Assistant Attorney General; Gerald A. Engler, Senior Assistant Attorney General; Catherine A. Rivlin, Supervising Deputy Attorney General; Christina Vom Saal, Deputy Attorney General |